Before The
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
The Telephone Consumer Protection Act of 1991	)	CC Docket No. 92-90
	)	
	)	

COMMENTS OF THE NATIONAL CONSUMERS LEAGUE

The National Consumers League
Suite 928N
815 Fifteenth Street N.W.
Washington, DC 20005

(202) 639-8140

May 26, 1992

Before The
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
The Telephone Consumer Protection Act of 1991	)	CC Docket No. 92-90
	)	
	)	

COMMENTS OF THE NATIONAL CONSUMERS LEAGUE

Introduction and Summary of Requested Action:

The National Consumers League, (herein "NCL"), hereby submits the following comments in response to the Notice of Proposed Rulemaking (herein "Notice") issued by the Federal Communications Commission (herein "FCC" or "Commission"), adopted on April 10, 1992, and released on April 17, 1992, seeking comment on tentative proposals contained in CC Docket No. 92-90, In the Matter of The Telephone Consumer Protection Act of 1991 (herein "Act").

I. The National Consumers League urges the Commission to withdraw its Notice of Proposed Rulemaking and instruct Commission staff to prepare for Commission consideration a new Notice of Proposed Rulemaking more fully in compliance with the language and intent of The Telephone Consumer Protection Act of 1991. The current proposal fails to carry out the intent of the Congress in

enacting this legislation.

II. Congress was concerned about the "proliferation of intrusive, nuisance calls" from telemarketers [PL 102-243, Sec.2(6)], as well as possible intrusive invasions of privacy, when it considered regulation of auto dialers and telemarketing calls from live operators. The Notice of Proposed Rulemaking consistently applies the test of "invasion of privacy" to its proposals [See Notice, p.3], but fails to reflect Congress's equal concern over the nuisance value of unrestricted telemarketing calls. The Commission must consider "nuisance" as well as "invasion of privacy" in its proposed rulemaking. The current Notice fails to acknowledge this Congressional concern.

III. The Commission should not add exemptions to the Act which the Act itself does not specifically authorize. The Commission's proposal to exempt non-profit and tax-exempt organizations from the requirements of its proposed regulations is well intentioned, but fails to recognize that charitable organizations and other non-profit organizations can be as much of a nuisance as commercial telemarketers.

IV. Debt collectors have indicated that proposed regulations requiring disclosure of auto dialer callers may violate the Fair Debt Collection Practices Act. The National Consumers League believes that this fear is unfounded in that non-disclosure requirements contained in the Act apply only to calls made to

persons other than the consumer for the purpose of locating the consumer and would most likely not be made by auto dialer.

V. The Notice of Proposed Rulemaking seeks comment concerning the "need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations" (See Notice, page 10). The National Consumers League believes that this need is already clearly and adequately demonstrated in the Act itself. Whether or not commentors agree that there is a need for regulation is irrelevant at this stage in the proceedings.

VI. The Notice of Proposed Rulemaking imposes overly burdensome tasks on consumer groups and other non-industry commentors by requiring a "rigorous" technical analysis of alternatives for establishing an "opt out" procedure for telephone subscribers who do not wish to receive telemarketing calls (See Notice, p.13). The Congress specifically called upon the Commission to make a comparison and evaluation of different methods and procedures for carrying out the intent of the Act - presumably using the in-house technical resources at its disposal. The Commission abrogates its responsibilities under the Act by transferring this responsibility to commentors. The effect of this requirement will be to limit the Commission's consideration of alternative proposals to those offered by the industry which the regulations intend to regulate. Commentors should be asked to respond to specific proposals furnished by the Commission.

VII. The National Consumers League believes that the Commission should adopt rules and regulations which provide the consumer with an inexpensive and effortless method to remove his or her name from telemarketing lists.

The U.S. Postal Service currently provides change of address information to marketing firms and could also provide them with "opt out" lists, since the precedent of providing assistance to telemarketing firms is already established. The National Consumers League recommends that space be provided on the current Change of Address form to indicate whether or not the postal patron wishes to receive telemarketing solicitations. We also recommend that the current postcard form be modified slightly to enable individuals who are not changing address to send in the form to indicate whether or not they wish to receive telemarketing calls. NCL believes that this service, which already provides change of address information to telemarketers, can also provide, at little or no additional cost, the "opt out" privilege authorized in the Telephone Consumer Protection Act.

VIII. The National Consumers League believes that the penalty provisions of the Telephone Consumer Protection Act of 1991 may require a national database, even though this may violate some principles of personal privacy. Unless the database is under the jurisdiction of the Federal Government or under its care and custody, it will be difficult to carry out the penalty provisions of the Act.

Discussion.

I. The Commission should withdraw its Notice of Proposed Rulemaking and direct Commission staff to prepare proposed rules and regulations consistent with the language and intent of The Telephone Consumer Protection Act of 1991.

The Congress enacted The Telephone Consumer Protection Act of 1991 to provide consumers a right to remove their names from lists compiled by companies which engage in commercial telephone solicitations.

For many Americans, the calls are an invasion of privacy. For others, they are simply a nuisance. In sending the Act to the President for approval, the Congress signalled its intention to provide relief to consumers.

The Act restricts use of auto dialers; controls the practice of sending anonymous facsimile messages for advertising and promotional purposes; and authorizes creation of a uniform national system to enable consumers to avoid the nuisance and harassment of telephone solicitations.

The Congress delegated to the Federal Communications Commission the task of carrying out its intent. It did not prescribe specific remedies, leaving to the Commission the task of choosing the most appropriate system to provide relief to consumers.

Why was this done? According to the Direct Marketing

Association's President, Jonah Gitlitz, the industry itself was "instrumental in avoiding legislative enactment of this idea (*imposing a specific system*) by having the FCC study alternative concepts." (Jonah Gitlitz, President, DMA, remarks delivered at a DMA meeting in Anaheim, California, March 26, 1991).

A more plausible explanation for leaving the task of selecting a system to the FCC was the unwillingness of Congress - which lacks technical expertise in this area - to impose a specific "opt out" procedure on the FCC and the direct marketing industry. A specific, Congressionally mandated system could pose insurmountable technical hurdles or prove ineffective in meeting Congressional objectives.

Whatever the reason, Congress delegated to the FCC, with its large and competent staff of technical experts, the responsibility for determining the best system to fulfill the Act's requirements.

It is clear that the Notice of Proposed Rulemaking issued by the Commission does not fulfill the intent of Congress and that consumers could end up with little or no relief. The Notice's failure to propose specific requirements for meeting the objectives of the Act; the Notice's solicitation of comments as to whether there is actually a need for regulation; and the Commission's request for additional comment on issues which have already been addressed and resolved by the Congress - make a compelling case for recision of the current Notice and issue of a new Notice which meets the criteria established by the Congress, accepts established findings, and carries out the will of Congress.

The National Consumers League has been impressed with this

Commission's adherence to high standards of fairness and its genuine concern for the needs of consumers in its regulatory actions. This was particularly evident in its actions regulating interstate pay-per-call services.

NCL believes that, upon reflection, the Commission will agree that its Notice of Proposed Rulemaking, intended to provide important consumer protections against unwanted telephone solicitations, fails to meet the high standards set by the Commission in previous rulemaking procedures.

We urge the Commission to reconsider its decision to issue this Notice and direct Commission staff to prepare new proposed rules and regulations which carry out fully the intent of the Congress and which meet the high standards set by the Commission to protect the American public.

II. The Notice fails to consider Congress's concern about the nuisance of unsolicited telephone marketing. By restricting its comments to possible "invasion of privacy", the Notice avoids an important issue and unnecessarily weakens the argument for a comprehensive set of regulations to provide consumer relief.

The Notice prepared by the Commission staff acknowledges the need to protect consumers from invasions of privacy which result from unsolicited telephone marketing. While this is an important consideration, it is not the only consideration. In Section 2 of the Act, there are multiple, specific references to the

Congressional finding that such marketing is also a "nuisance" [See PL 102-234, Sec.2, Subsections (6), (10), (13), and (14)].

When the "nuisance" test is applied, it becomes clear that the Notice of Proposed Rulemaking fails to underscore the seriousness of the abuses which prompted Congressional action. As Section 2 of the Act clearly states: "Many consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers" [See Act, Sec.2, (6)].

This sense of outrage is not evident in the Notice. The Notice states that the "overall intent of Section 227 is to protect consumers from unrestricted telemarketing, which can be an intrusive invasion of privacy" and argues that this potential invasion of privacy must be "balanced" in a way that permits "legitimate telemarketing practices" (See Notice, p. 3). While it is true that a balance must be struck, it is also true that, in this proceeding at least, the scale is tipped heavily on the side of the telephone marketer.

NCL believes that consumers should be protected against the nuisance and inconvenience of unrestricted telemarketing, as well as from possible invasions of privacy. To neglect this issue in its deliberations over implementation of The Telephone Consumer Protection Act is a serious matter. Were the full intent of Congress to be adequately weighed in the Commission's consideration of the Notice of Proposed Rulemaking, there would be little doubt that a much more comprehensive and specific set of proposed regulations would be addressed.

As it is, the proposed regulations address only part of the problem. For that reason, NCL believes that the proposed regulations are flawed and should be withdrawn in favor of a new set of regulations which meet the "nuisance" test.

III. The Commission should not add exemptions to the Act which are not specifically authorized in the Act.

The Commission proposes to exempt tax exempt nonprofit institutions from regulatory requirements pertaining to auto dialers. The stated reason is that the Act does not "specify whether such an exemption applies to auto dialer calls" (See Notice, p.5).

Applying the "nuisance" test to such calls, NCL does not believe that such an exemption is warranted. There is little distinction between recorded calls placed by commercial entities and those placed by tax-exempt nonprofit entities. Both can be a nuisance, as well as an invasion of privacy. The same can be said of similar calls placed by political campaigns, local, state, and federal government entities, and others dispatching recorded telephone messages in the guise of "public interest".

While NCL acknowledges the usefulness of auto dialers in emergency situations and for alerts to consumers about matters of general concern, it does not believe that public interest organizations will always act in the public interest. For that reason, the Commission should interpret the statute narrowly and

not provide wholesale exemptions which will only have the effect of reducing the effectiveness of the Act.

IV. The Act does not prevent debt collectors from adhering to the requirements of the Fair Debt Collection Practices Act.

The Fair Debt Collection Practices Act (15 USC 1692), among other provisions, requires debt collectors to avoid certain practices which harass or abuse any person in connection with the collection of a debt. Section 1692(d) of the Act lists several specific instances of illegal harassment, among them:

> (5) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.
>
> (6) Except as provided in Section 1692b of this title, the placement of telephone calls without meaningful disclosure of the caller's identity.

Section 1692(b) of the Act identifies the exemption as

> Communicating with any person other than the consumer for the purpose of acquiring location information about the consumer.

Debt collectors have indicated that the proposed auto dialer regulations requiring disclosure of callers may constitute a violation of Section 1692(b) of the Fair Debt Collection Practices Act. It appears that this concern may be unwarranted, since the exemption specifically applies to instances where debt collectors contact third parties in an attempt to locate a person in connection with the collection of a debt.

In such cases, they may not state the name of their employer. It is unlikely that such calls would be made by auto dialers. Therefore, requirements that the identity of a calling party be disclosed would not normally apply (See Notice, footnote #23, p.9).

V. The Notice asks for comment on the need to protect privacy rights in telephone solicitations. This is not necessary as the Act presupposes this "need".

> The Notice of Proposed Rulemaking seeks comment
>
> concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations, whether local or interstate.
>
> Furthermore, the Commission
>
> notes that the bulk of telephone solicitation complaints received by the FCC are in the auto dialer area. The Commission seeks comment on whether it is in the public interest to recognize the inherent difference in the nuisance factor of auto dialer calls as opposed to live solicitations.

The National Consumers League believes that comments on the need for protection against unsolicited telemarketing calls are not required in the current proceeding.

The clear intent of the Act is to direct the Commission to determine the best methods to meet needs which are specifically enumerated in the Act. The question of need itself is no longer at issue. Congress has established public policy in this area; and the President has endorsed that policy by approving the Act.

The National Consumers League does not believe that it is in the public interest to distinguish between the nuisance level of

auto dialers and live solicitations. The issue is not relative annoyance, but equal potential for creating a nuisance.

While NCL commends the Commission for acknowledging, in this instance, that the nuisance factor is at issue, it does not believe that it was the intent of Congress to release the Commission from its obligation to regulate live solicitations on the specious argument that auto dialers generate more complaints. Both must be regulated to the full extent required by the Act. Both types of solicitation must take into account the "nuisance" factor, as well as possible invasions of privacy. To differentiate would constitute a failure to meet obligations imposed by the Act.

VI. The Commission's Notice places unnecessarily burdensome requirements on consumer and other non-industry commentors by requesting "rigorous" technical analysis for those advocating any comprehensive "opt out" system or national database.

In its Notice of Proposed Rulemaking, the Commission asks commentors to provide a "rigorous analysis of costs and benefits of the national database alternative" (See Notice, p.13). It also states that this analysis should reflect

> that the Commission tentatively finds that any database would not be a government sponsored institution and would not receive federal funds or a federal contract for its establishment. (See Notice, p.13)

This requirement imposes a difficult burden on consumer groups and other public interest commentors. While some public interest groups may be able to sustain the cost of such a rigorous technical

cost/benefit analysis, most do not have the resources to do so and are therefore precluded from meeting the requirements of the Commission's Notice.

Furthermore, it appears that it was the intent of Congress to direct the Commission to undertake this comparison and evaluation of different methods and procedures for carrying out the requirements of the Act, presumably, using the extensive technical resources at its disposal.

The Commission proposes to rely on those who can furnish the required technical analysis of alternative proposals - in effect, the industry which the Commission proposes to regulate. Without leaning too heavily on the fox and chicken coop analogy, it appears that such a proposal defeats the purpose of the Act and precludes the Commission from undertaking a rigorous independent analysis of alternatives.

The explicit warning that comments which propose a federal interest (either by establishing a federal database or by contracting such a database to a private entity under federal guidelines) will be looked upon with disfavor, creates the impression that the matter is closed. The Commission should not close its mind to arguments on a major issue in this matter. Federal involvement may be the best way to fulfill the intent and requirements of the Act.

It is curious that the Commission would declare, in advance of any public comment period, that it is limiting its consideration to private databases or industry "self-policing" mechanisms (See

Notice, p.14) or that it interprets literally remarks made by the President when he approved the Act (See Notice, p.14).

Many public interest groups, including the National Consumers League, have applauded industry self-policing mechanisms. The Mail Preference Service and Telephone Preference Service of the Direct Marketing Association, for example, have provided a useful mechanism for channeling consumer complaints about junk mail and unsolicited telephone marketing practices. But they are no substitute for a comprehensive national policy on unsolicited telemarketing. Industry self-regulation does not generally make good public policy. There is no assurance that voluntary adherence to the Act by private companies through an industry self-regulatory mechanism will be effective.

Strict government regulation and penalties for failure to comply with regulation are much more powerful tools for establishing effective compliance with the Act.

VII. The Commission should provide a simple, inexpensive method to enable consumers to "opt out" of telephone marketing solicitations.

Although the Commission cautions against any proposals which would establish federal regulatory oversight over telephone marketing practices, the National Consumers League must express its belief that this is exactly what the Act requires. NCL believes that, since the Congress has spoken on the issue and established as

public policy the need to provide consumer relief from unwanted and unrestricted telephone solicitations, it is incumbent upon the Commission to create federal regulatory authority over this practice.

NCL believes that a first, guiding principle should be the creation of a simple and inexpensive mechanism which the consumer can use to remove his or her name from telephone solicitation lists. The most efficient way of doing this would be to provide post cards in U.S. Postal Service facilities to enable interested consumers to apply for removal from lists.

While it can be argued that the federal government should not be engaged in the mailing list business, it should also be noted that such is already the case.

It was recently disclosed that the U.S. Postal Service provides information on changes of address to mailing list brokers and others interested in maintaining the quality of their lists. The U.S. Postal Service has also engaged in post card programs, such as that used to determine the relative popularity of the younger and the elder Elvis. Certainly, it would not be overly burdensome to provide to telemarketers names and addresses and phone numbers of those individuals who don't want to get calls, if it willingly provides similar information on changes of address to these same marketers.

The National Consumers League suggests that the U.S. Postal Service add a simple check-off provision on the current Change of Address post card indicating that the individual or household

involved does not wish to receive telephone marketing calls. The individual making the change of address would add the new telephone number to the new address. If an individual is not changing address, but merely wishes to "opt out" of telemarketing lists, the same Change of Address post card - or similar card - could be used.

The most important consideration is the ease with which consumers can have their names removed from such lists. The purposes of the Act will be thwarted if telephone subscribers either do not know how to get their names removed or are faced with bureaucratic hurdles when they attempt to do so.

VIII. The penalty provisions of the Act may require either a national database or some federal supervision over the system chosen to implement the Act.

The Telephone Consumer Protection Act makes it unlawful for companies engaged in auto dialer or live telephone solicitation to engage in certain practices [See, for example, Act, Sect.3(b)(1)(A)] and establishes penalties for violations of those practices [See, for example, Act, Sect.3(c)(5)]. The National Consumers League questions whether, under these circumstances, the Commission can consider self-regulatory programs or any other means of complying with the Act which do not apply some form of federal jurisdiction over any database established under the Act. NCL is not competent to answer this question, but wishes to bring the matter to the Commission's attention as it considers this issue.

While the National Consumers League believes that a national database in and of itself raises some privacy issues, they are minor compared to the intrusive invasions of privacy and nuisance entailed in some telephone solicitations.

Conclusion.

The Congress has spoken on the issue of auto dialers and unsolicited telephone marketing calls. It has found that they can be a nuisance and can cause intrusive invasions of privacy. In approving The Telephone Consumer Protection Act of 1991, the Congress has directed the Commission to determine the best method of providing relief to telephone subscribers from the annoyance of unwanted telemarketing calls. The Congress, in charging the Commission with this responsibility, recognized the agency's technical expertise and broad background in dealing with similar issues of general public concern. It did not intend for the Commission to pass this responsibility on to the industry it is charged to regulate.

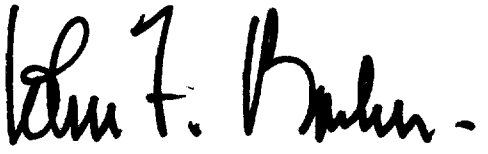
The Notice of Proposed Rulemaking, issued upon the Commission's directive, unfortunately fails to respond to Congress's intent and does little, if anything, to advance newly established public policy on the issue of recorded and live telephone solicitations.

The National Consumers League urges the Commission, for the

reasons cited above, to withdraw its current Notice and direct Commission staff to prepare for Commission approval a new Notice of Proposed Rulemaking which fully complies with the expressed intent of the Congress and the stated requirements of the Act.

The National Consumers League expresses its appreciation to the Commission for its past support of important consumer issues and the opportunity to submit its comments on the important issue of unsolicited telephone solicitations.

Respectfully submitted,



John F. Barker
Senior Program Associate
National Consumers League

Linda F. Golodner
President
National Consumers League

National Consumers League
Suite 928N
815 Fifteenth Street N.W.
Washington, D.C. 20005
(202)639-8140

May 26, 1992